



THE IMPACT OF THE MORTGAGE CREDIT DIRECTIVE
2014/17/EU IN PORTUGAL

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MARIANA FONTES DA COSTA

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JEAN MONNET CHAIR**

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BARCELONA

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List of abbreviations:

art. – article(s)

CPC – Código de Processo Civil (Civil Procedure Code)

DL – Decreto-Lei (Decree-Law)

L – Lei (Law)

n. - number

RGICSF – Regime Geral das Instituições de Crédito e Sociedades Financeiras (Legal Regime regulating Credit Institutions and Financial Corporations)

RJCCH - Regime Jurídico da Concessão de Crédito à Habitação (Legal Regime regulating Housing Credit Approval)

RPCCCH - Regime das Práticas Comerciais nos Contratos de Crédito à Habitação (Legal Regime regulating Commercial Practices in Mortgage Credit Contracts)

STJ – Supremo Tribunal de Justiça (Portuguese Supreme Court of Justice)

TRC – Tribunal da Relação de Coimbra (Coimbra Court of Appeal)

TRL – Tribunal da Relação de Lisboa (Lisbon Court of Appeal)

TRP – Tribunal da Relação do Porto (Porto Court of Appeal)

It could perhaps be expected that the consecutive reforms adopted since 1990 in view of liberalizing the Portuguese lease market and above all the strong decrease in the number of mortgage credits granted following the economic and financial crisis of 2007, would both contribute to a growth of the lease market in Portugal, turning it into an option contending with home ownership. However, recent data seems to bring this scenario into question by pointing to a 51% increase in the number of new mortgage credit contracts in 2015, compared with 2014⁶.

According to article 23/1 of the Legal Regime regulating Housing Credit Approval (approved by DL n. 349/98 of 11 December, henceforth RJCCH), housing credits shall be secured by a mortgage taken on the dwelling acquired, built or the object of financed works. Such mortgage may be replaced, partially or totally, by a mortgage taken on another building or by chattel mortgage over securities quoted on the stock exchange⁷ and, in exceptional cases, by any other securities that may be considered adequate by the lending credit institution in view of the loan's risk (see article 23/3). One may conclude from this wording that the Portuguese legislator effectively displays a preference for mortgage as the main security in the framework of housing credit.

According to article 23/2, in the wording of DL n. 222/2009 of 11 September, the lending credit institution may demand additional securities to reinforce the mortgage, namely life insurance to be taken out by the borrower and spouse.

Market behaviour points towards the combination of the mortgage together with a requirement of life insurance for both borrower and spouse and, very frequently, alongside with a personal security from a third party. However, due to the disruptions prompted following the 2007 crisis, there has been an increase in the requirement of contracting credit protection insurance, aimed at insuring against the risks of borrower income reduction and/or unemployment⁸.

Although housing credit constitutes the core of consumer credits secured by immovables, the scope of these credit contracts exceeds the credit contracts concluded in view of "purchasing, constructing and performing works in a person's own and permanent residence, secondary residence or for lease, as well as for purchasing land to construct a person's own residence" (see article 1/1 of the Legal

⁶ According to data from the Bank of Portugal, *Relatório de Acompanhamento dos Mercados Bancários de Retalho*, 2015, pp. 77 et seq., available online in <http://cliente.bancario.bportugal.pt/PT/Publicacoes/RAM/Paginas/RAM.aspx>, last checked in 30 August 2016.

⁷ By virtue of article 23/4, the value of the titles cannot, for the duration of the loan, be inferior to 125% of the respective balance. If this limit is not satisfied, the chattel mortgage may be reinforced by a mortgage or by the provision of new securities.

⁸ See ANDREIA MARQUES MARTINS, *Do crédito à habitação em Portugal e a crise financeira e económica mundial. Em especial: a prestação de garantias no crédito à habitação*, Revista de Direito das Sociedades, ano II, n. 3/4, 2010, pp. 770 et seq.

Regime regulating Commercial Practices in Mortgage Credit Contracts, approved by DL n. 51/2007 of 7 March, in the wording given by DL n. 192/2009 of 17 August, henceforth RPCCCH).

Recognizing the special vulnerability of the consumer borrower in the framework of a credit secured by a mortgage or other security over immovable asset, the Portuguese legislator widened, in 2009, the scope of the regulatory provisions of commercial practices of credit institutions as regards housing credit in order to encompass the so called related credits, i. e. credit contracts whose mortgage comprises, totally or partially, an immovable that simultaneously secures a housing credit contract concluded with the same institution (see article 1/2 of RPCCCH in the wording given by DL n. 192/2009 of 17 August).

In 2012, the Portuguese legislator opted once again to widen the scope of the regulatory provisions on commercial practices of credit institutions as regards housing credit to encompass all credits secured by a mortgage over an immovable asset or by another right over an immovable asset concluded by a single person pursuing objectives other than those of his/hers commercial or professional activity (see article 1/3 of RPCCCH in the wording given by DL n. 226/2012 of 18 October) This measure was based on the fact that credit institutions have been using mortgages in long-term loan contracts diverse from housing credits and related credits, especially when referring to future or conditional credits (an example of this reality is to be found in overdraft agreements)⁹. In addition, these credit contracts secured by mortgage are excluded from the legal regime of *Credit Contracts Concluded with Consumers* (see article 2/1, a) of DL 133/2009 of 2 June).

As follows from the preamble of DL n. 226/2012, the 2007 financial crisis favoured the joining or consolidation of debts entered into with several creditors in a single credit contract secured by an immovable asset, corresponding in most cases to the borrowers' family home, i. e. the asset with the highest value he/she owns. Hence, it became imperative to also widen the mortgage credit protection regime (in its fundamental aspects, such as provisions on information rights, renegotiation and early repayment of the loan) to the other types of consumer credits with a mortgage or another security over an immovable asset.

In a period from 1996 to 2007 the number of housing credit and related credit approved in Portugal is characterized by an upwards trend (with a slight decrease in the first trimester of 2003, then quickly on the rise again). By contrast, the current

⁹ See L. MIGUEL PESTANA DE VASCONCELOS, *Direito das garantias* cit., pp. 199-200 and JORGE ALVES MORAIS, CARLA MENESES ESTEVES, JÚLIA RODRIGUES DA SILVA, MARIA ADELAIDE RESENDE e ANA TERESA SANTOS, *Manual de Contratos de Direito Bancário e Financeiro*, 2nd ed., Quid Juris, Lisboa, 2008, pp. 195 et seq.

economic and financial crisis unsettled this financial optimism *status quo*, producing at its zenith a strong contraction effect as regards the approval of mortgage credit. This tendency became noticeable in the fourth trimester of 2007 and reached a very high magnitude from 2010 onwards. For example, there was a 58,7% drop in the number of contracts in the framework of mortgage credit concluded between 1 October 2011 and 30 September 2012 when compared to the same period on the previous year¹⁰.

In addition to the contraction in bank financing - that affected all sectors of the Portuguese economy and society - there was a rise in the credit contracts' default rate regarding loans taken out by individuals outside the scope of commercial or professional activities.

The rise in the default rate was most significant in relation to consumer credit, while more moderately felt as regards mortgage credit contracts. Such a disparity may perhaps be explained by a difference in the profile associated to the average debtor in each of these types of credit: the reference mortgage credit debtor at the onset of the crisis exhibited a stable professional and economic condition, whereas the consumer holding non-mortgage debt was resorting to credit as a last resort in order to rectify an already precarious financial condition.

In truth, contrary to what happened in the USA for example (and originated the subprime crisis), the reference mortgage credit debtor in Portugal belongs to the social classes with a higher disposable income, offering better solvency guarantees, averaging 35-44 years of age, university level education and holding an open-ended work contract¹¹.

This explains why the default rates in mortgage credit remained low, despite the expansion that began in the mid-1990s and lasted until 2007. Furthermore, it equally explains why the default rate in consumer credit and credit towards other ends rose from 6.7% to 12.7% between 2009 and 2013, while the default rate in mortgage credit rose from 1.6% to 2.4%¹².

¹⁰ According to data from the Bank of Portugal, *Relatório de Acompanhamento dos Mercados Bancários de Retalho*, 2012, p. 69, available online at <http://clientebancario.bportugal.pt/pt-PT/Publicacoes/RAM/Paginas/RAM.aspx>, last checked on 30 August 2016.

As stated above, the contraction scenario in the credit market began to slowly revert at the start of 2013. In fact, in 2015 there was a strong increase in the number of mortgage credit contracts concluded: 43.041 contracts concluded in 2015, up from 28.495 in 2014 and 25.847 in 2013 (See Bank of Portugal, *Relatório de Acompanhamento dos Mercados Bancários de Retalho*, 2015 cit., pp. 80 et seq.).

¹¹ ANA CORDEIRO SANTOS, NUNO TELES e NUNO SERRA, *Finança e Habitação em Portugal* cit., p. 34 et seq.

¹² IDEM, *ibidem*.

Nevertheless, one should not be tempted to assuage the deeply nefarious effects of the 2007 economic and financial crisis as regards default by consumers on their mortgage-secured debts and subsequent foreclosure of countless family homes.

Looking at the Bank of Portugal's official data, the percentage of mortgage credit debtors in default on December 2009 was 5.2%, then increasing to 6.1% in December 2012 and to 6.4% in December 2014¹³. According to data published by the Expresso newspaper in connection with the release of a study concluded by the Portuguese Real Estate Professionals and Brokers Association (APEMIP), during the first three months of 2012 an average of 25 homes per day was handed over to banks by families and real estate agents due to default, totalling 2.300 properties¹⁴.

The causes for such an increase in mortgage credit default vary, but one may point to a sharp increase in the unemployment rate, salary cuts and an increase of the tax burden as main factors¹⁵.

Further factors that could explain the effects of the 2007 economic and financial crisis on mortgage credit include (a) the speculation of property value coupled with an inadequate devaluation risk assessment thereof, together with (b) the absence of an adequate *loan to value ratio* safety margin¹⁶.

Adding to these factors, it is worth noting that mortgage credit approval was somewhat straightforward, at times without giving due consideration to the debtor's effort rate in view of acute variations of the applicable interest rates and/or the disposable income¹⁷.

Due to the increasing number of mortgage credit defaults, credit institutions went forward with judicial foreclosure procedures on mortgages, leaving families on the verge of losing their homes. As it happened, the steep devaluation in property value - exacerbated by market speculation during the pre-crisis years - frequently led to a scenario where the foreclosure, assignment or voluntary surrender (to the bank) of the family home was not sufficient to pay the debt in full. The mortgage system in Portugal is a full recourse system. Therefore, pursuant to the foreclosure of their home, private

¹³ Bank of Portugal, *Boletins Estatísticos de dezembro de 2010 e de dezembro de 2015* cit., pp. 105 and 135 respectively.

¹⁴ Available online in <http://bpiexpressoimobiliario.pt/25-casas-entregues-aos-bancos-todos-os-dias=f125885>, last checked on 30 August 2016.

¹⁵ See LUÍS MENEZES LEITÃO, *O impacto da crise financeira no regime do crédito à habitação*, in I Congresso de Direito Bancário, L. Miguel Pestana de Vasconcelos (ed.), Almedina, Coimbra, 2015, p. 9; L. MIGUEL PESTANA DE VASCONCELOS, *Direito das garantias* cit., p. 226, note 669 and ANDREIA MARQUES MARTINS, *Do crédito à habitação em Portugal e a crise financeira e económica mundial* cit., p. 730.

¹⁶ L. MIGUEL PESTANA DE VASCONCELOS, *ibidem*.

¹⁷ IDEM, *ibidem* e ISABEL MENÉRES CAMPOS, *Comentário à (muito falada) sentença do Tribunal Judicial de Portalegre de 4 de Janeiro de 2012*, *Cadernos de Direito Privado*, n. 38, 2012, p. 3.

individuals are not only deprived of the property but also remain obligated to pay the outstanding amount of the debt¹⁸.

In this context, influenced by a Spanish jurisprudential understanding echoed in the sentence of 17/12/2010 of the Audiencia Provincial de Navarra, the Court of Portalegre issued a paradigmatic sentence on 4 January 2012¹⁹ that would stop the presses and divide Portuguese legal scholars²⁰.

In the case concerned, the applicant initiated judicial proceedings on grounds for divorce. The bank intervened claiming to be creditor of an amount totalling €129.521,52 related to a housing credit for the buying of a mortgaged property, the sole asset featuring in the inventory. The court determined the execution of the mortgage through a judicial sale by silent auction (closed letters), with a starting bid of €117.500,00 and a price for disclosure consisting of 70% of this same value in accordance with the legal provisions in force at the time. Since the only proposal was submitted by the bank holding the credit for a total amount of €82.250,00, the property was adjudicated to it, and the bank then demanded payment for the debt's remaining value amount totalling €46.356,91.

The applicant opposed this claim, countering that the property's adjudication to the bank was sufficient to settle the debt in full. Essential to this argument was the fact that the creditor bank had loaned the subjects of the inventory precisely the amount

¹⁸ Underlining the debtor's "personal tragedy", see LUÍS MENEZES LEITÃO, *O impacto da crise financeira* cit., p. 10.

¹⁹ Available online at http://www.inverbis.pt/2012/ficheiros/doc/tribunalportalegre_creditohipotecario.pdf, last checked on 31 August 2016.

²⁰ Criticising this decision, for example, MAFALDA MIRANDA BARBOSA e DIOGO DUARTE CAMPOS, *A decisão do Tribunal de Portalegre, 4 de Janeiro de 2012, Breve anotação*, Boletim da Faculdade de Direito da Universidade de Coimbra, ano 88, 2012, pp. 379 et seq.; ISABEL MENÉRES CAMPOS, *Comentário à (muito falada) sentença do Tribunal Judicial de Portalegre* cit., pp. 3 et seq. and *O justiceiro: o estranho caso do juiz legislador*, *Ipsa Jure*, n. 36, May 2012 and ALEXANDRA FONSECA MARTINS, *Contrato de mútuo com garantia hipotecária. A modificação do contrato de crédito à habitação por alteração das circunstâncias ocorrida nos mercados financeiro e imobiliário*, Master Dissertation in Law from the Law Faculty of the University of Porto, 2014, pp. 23 et seq., available online in <https://repositorio-aberto.up.pt/bitstream/10216/77625/2/106567.pdf>, last checked on 31 August 2016 (also, on the Spanish decisions on this topic, GIL MORAES CAMPILHO, *Incumprimento do contrato de mútuo para aquisição de habitação e adjudicação do imóvel hipotecado por valor inferior ao da dívida exequenda*, Master Dissertation in Law from the Law Faculty of Porto of the Portuguese Católica University, 2011, pp. 41 et seq., available online in <http://repositorio.ucp.pt/bitstream/10400.14/8939/1/111229%20DISSERTA%C3%87%C3%83O%20DE%20MESTRADO%20-%20GIL%20CAMPILHO.pdf>, last checked on 31 August 2016.

Differently, advocating the correction of the decision on the abuse of right, LUÍS MENEZES LEITÃO, *O impacto da crise financeira* cit., pp. 15 et seq. e CARLA INÊS BRÁS CÂMARA, *A aquisição da propriedade do bem hipotecado pelo credor e a questão da satisfação (integral ou parcial) do crédito*, in *Estudos em Homenagem ao Prof. Doutor José Lebre de Freitas*, Vol. I, Armando Marques Guedes, Maria Helena Brito, Ana Prata, Rui Pinto Duarte and Mariana França Gouveia (ed.), Coimbra Editora, Coimbra, 2013, pp. 683 et seq.

of €117.500,00 towards the purchase of the mortgaged property, the amount the property was valued at in the proceedings.

The Portalegre Court's reasoning was that collecting the remaining amount corresponding to the purchase of the property configured an abuse of right, hence finding that both at the time of the purchase and at the time of the judicial foreclosure the creditor bank had acquiesced that the property be valued at €117.500,00.

Finally, the Court found that even if the situation did not configure abuse of right, it would always configure a situation of undue enrichment by the creditor bank, hindering the application on substance.

It is worth noting that the Court found that the bank was entitled to the remaining amount related not to the mortgaged property's purchase, but to an interest bearing loan contract valued at €3.550,00 concluded between the bank and the subjects of the inventory procedure and also secured by a mortgage on the same property. More specifically, this contract did not have the same scope that the Court found to have given rise to the abuse of right.

Notwithstanding the fact that, as affirmed by António Pinto Monteiro, this decision configures "an isolated event in Portuguese jurisprudence"²¹, it opened the door to a new approach in the legal defence of private individuals faced with the obligation of paying the outstanding amount of a debt following the loss of their home in favour of the creditor bank.

It should be stressed that although the high courts have not, until present day, issued a similar sentence, one can nonetheless perceive two jurisprudential tendencies: (a) one of outright denial of the possible existence of abuse of right or undue enrichment vis-à-vis the collection of the remaining amount of the debt by the credit institution (the main arguments being the fact that the property's adjudication to the creditor for an amount inferior to the property's assigned value constitutes a legal course of action and that the risk of the property's devaluation is borne by the purchaser not the creditor bank)²², and, (b) a second, more moderate one, recognising the possibility of that demand configuring an abuse of right in abstract, although considering that the respective requisites were not fulfilled in the cases *sub judice*. An example of the first tendency is the sentence of the TRC of 1 March 2016 (Falcão de Magalhães, case n.

²¹ See ANTÓNIO PINTO MONTEIRO, *A resposta do ordenamento jurídico português à contratação bancária pelo consumidor*, Boletim de Ciências Económicas da Faculdade de Direito da Universidade de Coimbra, Vol. LVII, tomo II, Homenagem ao Prof. Doutor António José Avelãs Nunes, ed. by Luís Pedro Cunha, José Manuel Quelhas and Teresa Almeida, 2014, pp. 2344-2345, note 17.

²² See MAFALDA MIRANDA BARBOSA e DIOGO DUARTE CAMPOS, *A decisão do Tribunal de Portalegre cit.*, pp. 384 et seq. e ISABEL MENÉRES CAMPOS, *Comentário à (muito falada) sentença do Tribunal Judicial de Portalegre cit.*, pp. 3 et seq. e *O justiceiro: o estranho caso do juiz legislador cit.*

133/14.6TBPCV.C1)²³. Examples of the second tendency are the sentences of the TRL of 11 October 2012 (Pedro Martins, case n. 1417/08.8TCSNT.L1-2); of the TRL of 12 December 2012 (Maria de Deus Correia, case n. 23703/09.0T2SNT-B.-L1-6) and of the TRC of 3 March 2015 (Maria João Areias, case n. 1067/12.4TVLSB.C1).

Part II: The impact of Directive 2014/17

At present time (8 September 2016) Portugal has not yet transposed Directive 2014/17/EU.

Some aspects of the Directive are already dealt with in Portuguese legislation in somewhat similar terms. Conversely, other aspects have a novel nature that require an effort geared towards adapting the existing legal provisions, as well as a recast of the overall legal regime of consumer mortgage credit contracts²⁴ making it accessible and understandable by the intended public, especially by the consumers themselves²⁵.

Starting with the subjects already dealt with in Portuguese legislation, it is worth pointing out that the topic relating to information and advertising duties has been given special attention by the legislator. Firstly, in the regime regulating the contracts of adherence and standard terms (in Portugal regulated by DL n. 446/85, of 25 October)²⁶ and secondly by the norms specifically created to regulate banking activity in general and mortgage credit approval for consumers in particular²⁷.

Advertising duties are essentially regulated in articles 11 of the RPCCCH, 24 of RJCCH, 6 of DL n. 240/2006, of 22 December and 14 of the Bank of Portugal's Warning²⁸ n.

²³ All the sentences without indication of source may be found online at www.dgsi.pt.

²⁴ We make reference in the text to "consumer mortgage credit" for ease of expression meaning to also encompass in this concept consumer credit secured by another right on an immovable asset.

²⁵ The scattered nature of the legislation currently in force makes it virtually impossible for the reasonably informed Portuguese consumer to have adequate knowledge of it.

²⁶ As regards the possibility of invoking the information and disclosure duties imposed on the contractor resorting to contracts of adherence, it should be mentioned that these are not always applicable in the case of mortgage credit contracts, given the fact that the consumer specifically chose this type of contract following different simulations presented to him and given the opportunity to negotiate specific contractual terms: in these cases, and as stated by the STJ in a sentence of 8 March 2016 (Hélder Roque, case n. 1786/12.5TVLSB.L1.S1), following the TRL sentence of 20 February 2014 (Ilídio Sacarrão Martins, case n. 1786/12.5TVLSB.L1-8), we are not before a true contract of adherence (despite the fact that the same contract may hold standard terms deserving the legal protection conferred to them).

²⁷ On the topic of banking information, *see*, for all, ANTÓNIO MENEZES CORDEIRO, *Direito bancário*, 5th ed., with the collaboration of A. Barreto Menezes Cordeiro, Almedina, Coimbra, 2014, pp. 396 et seq. e L. MENEZES LEITÃO, *Informação bancária e responsabilidade*, in *Estudos em Homenagem ao Professor Doutor Inocêncio Galvão Telles*, Vol. II, *Direito Bancário*, Almedina, Coimbra, 2002, pp. 225 et seq.

²⁸ On the prudential nature of the Bank of Portugal's Warnings and its relevance as an instrument for the exercise of the institution's supervision duties, MARIA RAQUEL GUIMARÃES e MARIA REGINA REDINHA, *A força normativa dos Avisos do Banco de Portugal – Reflexão a partir do Aviso n.º 11/2001, de 20 de novembro*, in *Nos 20 anos do Código das Sociedades Comerciais. Homenagem aos*

10/2008 of 22 December, in terms approximate to those of the requirements featured in article 11 of the Directive. The constant specification of article 11/2, j) of the Directive is particularly interesting, given it has no equivalent in current Portuguese law.

Although I do not have any knowledge of a requirement equivalent to the one featured in article 11/6 of the Directive in Portuguese law regarding advertising duties, a similar requirement was introduced by DL n. 227/2012 of 25 October and by the Bank of Portugal's Warning n. 17/2012 of 17 December, regarding pre-contractual information. By virtue of article 7 of the said DL, and following legislative measures in response to the 2007 economic and financial crisis, credit institutions are now required to provide bank customers and other parties with information about the over-indebtedness risks and the consequences of defaulting on credit contracts, as well as about the procedures created by the same legislation in view of normalizing cases of default. The Banking Client Support Network was also created, composed by entities certified and recognized by the Directorate-General for Consumers. Detailed information was also made available on the legal regimes regarding credit contracts' default on the Banking Client web portal (<http://clientebancario.bportugal.pt>) and at the *Todos Contam* web portal (www.todoscontam.pt). Taking into account the Portuguese reality and despite the merits of this measure, it is my opinion that it is necessary to reinforce the information duties of credit institutions vis-à-vis third person guarantors, especially guarantors of mortgage credit to consumers. Specific clarification should be given concerning the nature and effects of the third party security as well as the consequences for the guarantor when the bank is authorized to start default procedures against him before exhausting the borrower's assets.

The credit institutions' and financial corporations' duty to inform is dealt with generically in article 77 of the Legal Regime regulating Credit Institutions and Financial Corporations (approved by DL n. 298/92 of 31 December, henceforth RGICSF). Conversely, the duty to inform regarding mortgage credit contracts to consumers is dealt with in detail in article 10 of the RPCCCH, article 5 of DL n. 240/2006, of 22 December and article 24/3 of the RJCCH according to which the credit institution is required to present to the borrower a simulation of the loan's financial plan that shall account for the conditions in force at the time the credit is approved.

The Bank of Portugal's Warning n. 2/2010 of 16 April regulates more precisely the specific information that credit institutions shall provide customers when negotiating

Prof. Doutores A. Ferrer Correia, Orlando de Carvalho e Vasco Lobo Xavier, Vol. III, Coimbra Editora, Coimbra, 2007, pp. 708-709 and JOÃO PACHECO DE AMORIM, *Os poderes normativos do Banco de Portugal*, in I Congresso de Direito Bancário, L. Miguel Pestana de Vasconcelos (ed.), Almedina, Coimbra, 2015, pp. 331 et seq.

and concluding mortgage credit contracts, determining the obligation to provide a standardised information sheet at pre-contractual level. This sheet shall be provided to the client on the occasion of the loan condition's simulation, either it is performed at an office of a credit institution, through its websites, or by any other means of communication. In addition, the sheet has to be provided once more to the client together with the communication of the loan's approval, now comprising the conditions approved.

Although the standardised information sheet presently in force has information requirements very close to those introduced by annex II of the Directive (see Bank of Portugal's Instruction n. 45/2012 of 17 December), the current Portuguese legislation does not foresee a minimum period of time for the client to compare proposals and make an informed and pondered decision. Consequently, the introduction of a minimum period of seven days, foreseen in article 14/6 of the Directive, establishes a reinforcement of the consumer's protection, both regarded as a reflection period or as a right of withdrawal: in my personal view, this constitutes an added-value that will arrive from the transposition of the Directive to the national legislation, especially if in the form of a right of withdrawal or as a mandatory reflection period, during which acceptance of the contract is not allowed.

Notwithstanding the relevance of the solution introduced by the Directive, an outcome close to the introduction of a reflection period has been achieved in Portugal by determining that the field "Comments" in the standardised information sheet provided after the loan's approval shall indicate the number of days during which the document's conditions and the contract's draft remain valid after being handed over to the client.

Following the loan's approval communication, the credit institutions are also obliged to provide the client a draft of the contract that shall include the information listed in article 6 of the Bank of Portugal's Warning n. 2/2010. These include, among several others: the amount and purpose of the loan; the applicable interest rate regime; the identification of the financial products and services acquired by the client in association with the loan; conditions and types of loan repayment.

The quoted Bank of Portugal's Warning further determines an obligation to provide information during the lifetime of the contract regarding different aspects. In this regard, the adjustment to the loan's interest rate must be communicated by the credit institution in the monthly statement mailed to the client during the contract's lifetime. However, if the statement is not mailed within a minimum of 15 days before that month's instalment is due, the adjustment to the loan's interest rate must be communicated to the client before that deadline (see article 7/1, and 2). Joining both

these provisions produces an outcome that guards against the EU legislator's concerns that provide the basis for article 27 of the Directive.

Another topic that the Portuguese legislator has been concerned with is the need to address the tying and bundling practices by credit institutions²⁹.

As a result, the RPCCCH features a prohibition of mandatory associated sales in article 9. Also, article 6 states that the commission charged in the event of a transfer of the credit to another institution may not exceed 0.5% (for variable interest rate contracts) or 2% (for fixed interest rate contracts) of the amount to be reimbursed. Plus, article 8 prohibits appending any additional charges or expenses for these operations. Furthermore, by virtue of article 7 RPCCCH, in case of early repayment of the loan in view of transferring the credit, the first credit institution must provide the new credit institution within ten days with all the necessary information and elements in order to carry out these operations, mainly the amount of capital due and the contract's remaining lifetime.

The requirement of a life insurance contract guaranteeing the payment of the remaining amount in case of death and/or disability of the debtor is common practice among Portuguese credit institutions. Hence, DL n. 222/2009 of 11 September states that the credit institution must inform the client that he/she has the right to freely choose the life insurance provider or assign as guarantee one or more life insurance policies he already holds, provided these have a coverage and requirements similar to those proposed by the credit institution [see article 4/3, d)]. The credit institution also has the duty to inform the client that he/she may transfer the loan to another credit institution using as guarantee the same life insurance policy, or conclude another life insurance contract replacing the first one, in order to guarantee the same mortgage credit [see article 4/3, e). On this topic, see also article 4 of DL n. 171/2008 of 26 August].

The regime regulating the early repayment of the loan is also developed to a high degree in Portugal, broadly addressing the concerns expressed by the EU legislator in article 25 of the Directive.

Firstly, by virtue of article 3/2 of RJCCH the borrower may perform a total or partial early repayment of the loan without any additional charges other than those expressly foreseen in the contract.

²⁹ On the special exposure of mortgage credit to cross-selling strategies by credit institutions, see ANDREIA MARQUES MARTINS, *Do crédito à habitação em Portugal e a crise financeira e económica mundial* cit., pp. 760-761 and GIL MORAES CAMPILHO, *Incumprimento do contrato de mútuo para aquisição de habitação* cit., p. 6.

The partial early repayment of the loan may be performed at any moment during the contract's lifetime regardless of the amount due, as long as it is completed in a date coinciding with a monthly instalment due date and a 7 week-days' notice is given to the credit institution (see article 5/1 of RPCCCH); the early repayment in full may also be completed at any moment during the contract's lifetime, as long as a 10 week-days' notice is given to the credit institution (see article 5/2).

Similarly to what is determined regarding the transfer of a credit to another institution, in case of early repayment of the loan the applicable fee has to be expressly foreseen in the contract and may not exceed 0.5% over the amount repaid for variable interest rate contracts, nor 2% for fixed interest rate contracts. Charging any additional charges or expenses for performing these operations is prohibited (see article 6 and article 8 of RPCCCH)³⁰. In the event of repayment due to death, unemployment or expatriation for work reasons no fees may be charged (see article 6/3). Finally, in accordance with article 5/2, the life insurance contract associated to the credit is terminated in case of early repayment of the loan, and no penalty clauses are permitted for early termination of the contract on these grounds.

Focusing the attention on the annual percentage rate of charge (APRC) (article 17 of the Directive), the Portuguese legislator's main concern has been to ensure transparency regarding the impact of promotional conditions offered to the client on the calculation of this rate, requiring the indication of the annual percentage rate (APR) applied if the conditions mentioned are not present (see article 3 of RPCCCH).

Regarding the solution opted for in article 17/5 of the Directive, there seems to be no equivalent solution in Portuguese law.

As regards the solution established in article 17/6, the standardised information sheet currently in force in Portugal must contain a simulation of the loan's financial plan in case the nominal annual interest rate rises by 1 percentage point and by 2 percentage points. However, no warning is foreseen in the event there is no maximum limit of the borrowing rate; curiously this warning is also not part of the mandatory disclosure information about the risks of over-indebtedness and default, that this paper made reference to above.

The most important innovations brought by the Directive are perhaps the rules regarding the regulation of the credit institutions' staff remuneration, the specific

³⁰ Defending that prizes and promotional offers that are subject to a condition regarding a minimum duration of the loan do not fit within this regime, see J. CALVÃO DA SILVA, *Direito de cumprimento antecipado do contrato pelo mutuário de crédito à habitação: da auto-regulação no Decreto-Lei n. 349/98 à hetero-regulação impositiva pelo Decreto-Lei n. 51/2007*, Revista de Legislação e de Jurisprudência, ano 136, 2006-2007, pp. 272 et seq.

knowledge and skill requirements for this staff, and the regulation of the activity of intermediaries in negotiating and concluding mortgage credit contracts.

Contrary to what occurs, for example, in the activity of financial instruments intermediation, mortgage credit deal brokerage is not regulated in Portugal. In this sense, the transposition of the Directive is set to positively fill this legal void.

Additionally, the assessment of the degree of knowledge and skills required of credit institutions' employees and credit intermediaries (annex III of the Directive) presently has no equivalent in Portuguese legislation³¹, especially considering the requirement that this has to be based (at least cumulatively) in professional qualifications (mainly diplomas, studies, training and/or competency tests).

Article 22 of the Directive regarding the provisions applicable to advisory services likewise has no equivalent in Portuguese legislation. In fact, the problem of client's trust in the banking institution in Portugal had its contours discussed especially in the commercial market segment, where the steep drop in the reference interest rate brought on catastrophic consequences for clients that concluded interest rate swap contracts. With regard to mortgage credit, the sharp decrease in property value seems to have weighed more than the lack of information or erroneous advice being provided.

Lastly, the issue of staff remuneration foreseen in article 7 of the Directive, only has a parallel in articles 115-C and 155-E of RGICSF, whose substantive applicability is limited to: i) members of administration or oversight bodies; ii) top management; iii) staff in-charge of risk assumption decisions; iv) staff in-charge of control tasks; v) employees whose overall compensation places them in the same pay grade than the first three categories indicated and as long as their professional activities have a factual impact on the credit institution's risk profile.

Even so, the programmatic nature of article 115-C of RGICSF stresses the positive nature of article 7/3, b) and 4 of the Directive, by virtue of which the remuneration policy must not be dependent upon the number or the proportion of requests accepted by the creditworthiness assessment staff, nor sales targets in case of the performance of advisory services.

No equivalent can also be found to article 23 of the Directive in Portuguese legislation. Plus, no data could be found regarding the number of loans concluded in foreign currency, neither any reference to the impact of the economic and financial crisis on

³¹ The RGICSF only foresees the requirement to assess the professional competence of holders of essential tasks, i. e., for employees carrying out tasks "that confer them significant influence in the credit institution's management" (see article 33-A).

them. This may cause some surprise given the number of properties sold to foreign nationals in Portugal³².

The common practice in Portugal is to conclude variable interest rate mortgage credit contracts indexed to EURIBOR at 3, 6 or 12 months, thus no records exist of problems stemming from the adoption of different index-linking.

The issues that most directly contributed towards the nefarious effects of the 2007 economic and financial crisis on consumer mortgage credit were the creditworthiness assessment, property evaluation and consequences on the event of default.

The Portuguese legislation does not foresee any creditworthiness assessment requirements comparable to those introduced by articles 18 and 20 of the Directive. In fact, article 22/5 of RJCCH (introduced amidst the crisis by L n. 59/2012 of 9 November) states that “the approval of loans and the decision on the contract’s terms should take into consideration the credit operation’s risk profile”, a clearly vague and ambitious formulation. Encumbering consumer mortgage credit approval based on the effort rate, thus seems a measure worthy of praise, despite having to be adjusted in a global creditworthiness assessment when the credit is also secured by a third party.

The property’s appraisal is presently regulated on article 30-A of the RJCCH, also amended amidst the crisis period by L n. 59/2012. It establishes the obligation of the credit institution to provide the consumer with a copy of the reports and other documents of any evaluation the property undergoes by the lending credit institution or by a third person at its request. The consumer is then entitled to present a written complaint regarding the outcome and basis of this appraisal that must elicit a response by the credit institution. Finally, the borrower has the right to request a second appraisal of the property to the credit institution, paying the respective costs.

It should nonetheless be noted that, contrary to this general regime of property appraisal for the approval of mortgage credit, the Portuguese legislator foresaw on article 29 of L n. 58/2012 of 9 November that whenever the access to the *Extraordinary scheme for protection of mortgage loan debtors in a very difficult economic situation* (a transitional regime made to deal with the special difficulties created by the 2007 crisis regarding mortgage credit default cases, that we will make reference to below) is contingent upon the property’s appraisal, that evaluation must be promoted by the credit institution and performed by an appraiser certified by the Portuguese Securities Market Commission (CMVM) at the borrower’s expenses.

³² According to data collected by the Portuguese Real Estate Professionals and Brokers Association (APEMIP) and published by Sol newspaper on 26 March 2014 one in five properties sold in Portugal was purchased by foreign nationals. See <http://sol.sapo.pt/artigo/501542/estrangeiros-compram-cada-vez-mais-casas-em-portugal>, last checked 31 August 2016.

Finally let us focus the attention on the specific topic of mortgage credit contractual default and also in the subsequent foreclosure. If one may consider there are no significant lapses to signal regarding the existence of mechanisms enabling lenders to trigger the securities over immovable property in Portugal (not considering the pressing issue of the judicial backlog common to the entire system), the same cannot be said as regards the adoption of a value for the mortgaged property for the purposes of transfer of property as part of the payment, sale or adjudication to the creditor. This is the point at which the 2007 crisis most laid bare the fragility of the Portuguese mortgage system. In this sense, the measures the Directive's transposition may bring into effect regarding increased transparency of this whole procedure will be praiseworthy (such as the solution in article 26/2).

Although overdue payments and foreclosure are issues looked at in detail in part III below, at this point it is worth noting that they were subject to strong legislative action pending the 2007 crisis. The solutions adopted then largely meet the concerns displayed by the EU legislator in article 28 of the Directive.

As a result, by virtue of article 7-B of the RJCCH (amended by L n. 59/2012 of 9 November), credit institutions may only foreclose or otherwise terminate a credit contract for the purposes of purchasing or building an own and permanent residence on grounds of default if the borrower has default on the payment of at least three instalments. Furthermore, partial default on payment of the instalment is not considered for the purposes previously enunciated, as long as the borrower pays the remaining amount plus any interest due at the moment when the following instalment is due.

The same L n. 59/2012 introduced article 23-B in the RJCCH, further adding that the borrower is entitled to recover the contract if he pays all the instalments due, plus interest and the expenses the credit institution incurred in during the time-frame available to oppose the foreclosure proceedings of the property, in case no credits were claimed by other creditors; in this case, the contract's termination is disregarded and the contract is recovered in the exact same terms and conditions as the original contract, with the necessary adaptations. In accordance with article 23-B/3 the credit institution is only obliged to recover the contract twice during its respective lifetime.

Beyond these measures, the Portuguese legislator introduced in DL n. 227/2012 of 25 October an action plan to address the default risk (PARI) requiring that credit institutions describe in detail the procedures and the measures adopted for overseeing credit contracts and managing situations where a default risk was present, seeking to promote preventive action in the face of early warning regarding a client's deteriorating financial position (see article 11).

In the same DL (see articles 12 et seq.) the Portuguese legislator introduced the default situation regularization extrajudicial procedure (PERSI) applicable to clients in contractual default situations. Whence the client is included in the PERSI, provided the financial position still allows the repayment of the outstanding amount or the payment of the amount of interest, the credit institution should offer the client the contract's renegotiation in terms allowing him/her to carry it out or its consolidation along with other credit contracts. By virtue of article 18 of DL n. 227/2012, pending the PERSI the credit institution is barred from: terminating the contract on grounds of default by the borrower; initiate legal proceedings in view of obtaining the credit's settlement; assigning the credit in full to a third party; or, assigning its contractual position to a third party. However, during this period, the institution may: make use of interim orders fit to ensure the effectiveness of the credit right held; assign credits for purposes of securitisation; or, assign credits or assign its contractual position to another credit institution.

Finally, the legislator introduced a prohibition of any increase of charges related to the credit whenever its renegotiation occurs on the following grounds: i) conclusion with a third party of a lease agreement of part or the total of the property, on grounds of relocation of the borrower's or another household member's (non-descendent) workplace to a location no closer than 50km, in a straight line, of the respective property when this entails a change of the household's permanent place of residence, or, by event of unemployment of the borrower or another member of the household; ii) or on grounds of a renegotiation due to divorce, legal separation, civil partnership dissolution or death of a spouse when the loan is held by a borrower that proves that the household has an income that allows for an effort rate lower than 55% or 60% in the case of households with two or more dependents.

Part III: Relevant issues that are not solved by Directive 2014/17

The Directive's article 28/4 and 5 deals with some of the more delicate problems of mortgage credit to consumers according to the Portuguese experience of the 2007 economic and financial crisis. However, the reference to the freedom of contract in article 28/4 and the vague programmatic nature of article 28/5 reveal the inability (or unwillingness) of the Directive to deal in a more profound way with the issue of the property's transfer as part of the payment and its sale or adjudication to the creditor for an amount inferior than the remaining debt. Thus, the possibility is there that these issues will persist even following the transposition³³.

³³ Likewise stressing that the Directive falls short in dealing with these issues, see LUÍS MENEZES LEITÃO, *O impacto da crise financeira* cit., pp. 25-26.

As referenced in the end of part I, the major perplexity regarding consumer mortgage credit default is based on the fact that the individual is faced with the loss of the family home, the most valuable asset owned, but still remains bound to the payment of the remaining amount of the debt not covered by the value attributed to the property.

This consequence hinges essentially on three reasons: the adoption of a full recourse system for mortgage backed debts; the soft demand by credit institutions regarding *loan to value ratio*; and, finally the foreclosure's legal regime allowing the purchase by a third person or the creditor itself for an amount significantly lower than the appraisal concluded in view of the sale. Little doubt remains that none of these aspects is addressed in a systematic way in the Directive.

Beginning with the last point, in Portugal until 10 November 2012 the price for the foreclosure was set at 70% of the property's value. With the propagation of the crisis in the real estate sector, the purchase was often completed by the credit institution precisely at the minimum limit of 70% of the base value, thus obtaining the judicial adjudication of the foreclosed property with a benefit of 30% when compared to the real value³⁴. This situation was mitigated with the entry into force of L n. 60/12 of 9 November that increased the value of the foreclosure up from 70% to 85% of the property's base value (currently article 816/2 of the CPC). It should be added that, by virtue of article 821/3 CPC, in the framework of the sale procedure concluded by closed letter, no proposals may be accepted holding a value below this minimum, except if the entity initiating the foreclosure along with the debtor and all the creditors with a security over the asset agree that it is acceptable³⁵.

The same Law further changed the method for determining the property's base value. It should now be the highest of the following: a) property value for tax purposes, as determined in the six years before; b) market value (current article 812/3 of the CPC).

In order to implement article 28/5 of the Directive as to the adoption of measures allowing the best property price to be achieved, it should perhaps be considered that the foreclosure be promoted through specialized entities or institutions, such as real estate companies thus better controlling fraud in property appraisal³⁶.

³⁴ However, this reasoning can be said to have a flaw given that an asset, in actual fact, is only worth the amount the market is willing to pay for it. Hence the absence of other proposals during the foreclosure shows the difficulty of reintroducing these properties again in the market, an onus that following the adjudication befalls the credit institution. Performing an assessment of this aspect would require analysing the profit percentage that credit institutions obtain when reselling these properties.

³⁵ By sentence of 31 October 2013 (José Manuel de Araújo Barros, case n. 5074/10.3YYPR-T-B.P1), the TRP decided that the adjudication to the creditor of the property in the sale by private negotiation is likewise not admissible if concluded for a value inferior to 70% of the base value.

³⁶ See ISABEL MENÉRES CAMPOS, *Particularidades da execução de hipoteca*, intervention available online at

Regarding the nefarious consequences of the full recourse system adoption, closely linked to the soft demand policy as to *loan to value ratio* by credit institutions, it should be stressed that the present paper does not propose changing the mortgage system to a non-recourse system (such as the one adopted in most states in the USA)³⁷: as stated before, the property devaluation risk should, in normal situations, be borne by the party that benefits from the immovable, i. e. the borrower. Thus, the solution introduced by article 28/4 of the Directive, finding an equivalent in Portuguese legislation in article 23-A/1, b) of RJCCH (according to which the executive sale or transfer of the property to the creditor only releases the borrower in full regardless of the result of the sale or the value placed on the property in the event of an agreement between the parties).

Nonetheless, when the contract is concluded, the credit institution should inform and duly enlighten the borrower about the property's devaluation risk and the possibility of, consequently, the borrower losing the property and even so remain bound to the repayment of the outstanding debt pursuant to an event of default³⁸.

The reinforcement of securities and the *loan to value ratio* requirement should concentrate the legislator's efforts, in view of reducing as much as possible to the minimum the cases in which the sale or the property's surrender are insufficient to repay the full amount of the debt to the credit institution. On this matter, quoting the example by L. Menezes Leitão³⁹, the solution adopted by Canada comes across as especially interesting. While maintaining a full recourse system, it prohibits the banks of approving a loan amount higher than 80% of the property's value without requiring the subscription of an insurance policy⁴⁰. In addition to life insurance, presently already a requirement by most credit institutions, this insurance would aim to protect the borrower against sudden reductions of the household's disposable income, especially in situation of involuntary unemployment, salary reduction or temporary infirmity or permanent work disability, on event of disease or accident.

<http://www.dgpj.mj.pt/sections/informacao-e-eventos/anexos/sections/informacao-e-eventos/anexos/dra-isabel-meneres/downloadFile/file/imc.pdf?nocache=1210676672.22>, last checked on 4 September 2016.

Carla Inês Brás Câmara proposes the online disclosure of all the elements associated to the foreclosure, thus improving circulation - see CARLA INÊS BRÁS CÂMARA, *A aquisição da propriedade do bem hipotecado pelo credor* cit., p. 766, note 135.

³⁷ For a comparative analysis, see LUÍS MENEZES LEITÃO, *O impacto da crise financeira* cit., pp. 9 et seq.

³⁸ Pointing out the special importance of the duty to inform on this sensitive matter and stressing that the intensity of this duty varies along with the specific borrower's vulnerability, see L. MIGUEL PESTANA DE VASCONCELOS, *Direito das garantias* cit., p. 227.

³⁹ LUÍS MENEZES LEITÃO, *O impacto da crise financeira* cit., p. 10.

⁴⁰ CANADA MORTGAGE AND HOUSING CORPORATION, *Comparing Canada and U.S. Housing Finance Systems*, available online at https://www.cmhc-schl.gc.ca/en/corp/nero/jufa/jufa_018.cfm, last checked on 4 September 2016 (source equally quoted by LUÍS MENEZES LEITÃO, *ibidem*).

Despite the fact that the Directive may have gone further as regards consumer protection, the abnormality surrounding acute economic and financial crisis situations may point towards the adoption of exceptional protection measures in order to respond to these anomalous temporary situations.

The Portuguese legislator adopted such an approach. Noteworthy solutions are enshrined in L n. 58/2012 of 9 November, that the same legislator designated as *Extraordinary scheme for protection of mortgage loan debtors in a very difficult economic situation*⁴¹.

This legal diploma, temporarily in force until 31 December 2015 had its applicability limited to situations of mortgage credit contract default in which: i) the credit was secured by a mortgage on a property qualified as own and permanent residence, and the sole dwelling of the borrower's household purchased with the borrowed amount; ii) the borrower's household was in a very difficult economic situation, in accordance to the criteria of article 5; iii) the property's value did not exceed the values established by article 4/c), i. e., between €100,000 and €130,000, depending on the coefficient of localization.

If the borrower qualified for the special scheme of L n.º 58/2012, he would then benefit from three potential protection measures destined to ease debt repayment: the debt restructuring plan; the additional measures to the restructuring plan; or the measures alternative to the foreclosure. Whence the borrower requested this debt restructuring plan, the credit institution was prevented of promoting the foreclosure until the request was rejected or, if accepted, pending the duration of the restructuring plan.

The main measures part of the debt restructuring plan (article 10) entailed a latency period regarding the payment of monthly instalments, or determining a residual value in the repayment plan; extending the loan's repayment deadline; reducing the spread during the latency period; or granting an additional autonomous loan aiming at temporarily supporting the payment of the mortgage credit instalments.

If a debt restructuring plan was impossible to apply and article 20 requirements were fulfilled, L n. 58/2012 foresaw the applicability of one of the following substitution measures: the *datio in solutum* of the mortgaged property; the sale of the property to the urban lease property investment fund (FIIAH) promoted and agreed by the credit institution, with or without lease and purchase option benefiting the borrower and the

⁴¹ For Carla Inês Brás Câmara these measures were, however, inadequate and insufficient. - CARLA INÊS BRÁS CÂMARA, *A aquisição da propriedade do bem hipotecado pelo credor* cit., p. 650. Stressing the insufficiency of the legislator's intervention on this matter of no full repayment of the debt in the event of the property being surrendered, LUÍS MENEZES LEITÃO, *ibidem*, pp. 25-26.

surrender of the value/price to the credit institution, thus settling the debt; the property swap for another property lower in value, along with the credit contract's revision and a reduction of the remaining debt for the amount of the difference between both properties. The borrower was further granted the right to refuse the property swap measure and the sale to the FIIAH with a property lease option, other measures being applicable in this case.

The *datio in solutum* measure holds special relevance. Mainly given it promotes the extinction of the debt in full when: i) the sum of the property's updated appraisal value and the amounts surrendered as repayment of capital were, at least, equal to the value of the initial borrowed capital, accrued of the capitalizations that meanwhile occurred; or ii) the value of property's updated appraisal was equal or higher than the outstanding debt (article 23/1). For those cases where the *datio in solutum* did not extinguish the debt, it remained but limited to the outstanding capital, not qualifying for new real or personal securities (see article 23/2 and 3).

It will be interesting to assess in what way these extraordinary measures of temporary nature will provide inspiration for the Portuguese legislator in densifying the programmatic provisions enshrined in article 28/4 and 5 of the Directive.

Part IV: Personal conclusions

Considering all the above, the purpose of these last few lines is to point out, very briefly, some personal conclusions on the most important merits and limitations of Directive 2014/17.

Firstly, one should not ignore the importance of the effort Directive 2014/17 embodies in the harmonization of the legal regime on credits for consumers secured by residential immovable property, thus enhancing legal security through knowledge and familiarity within the European Union (at least in the sense of establishing minimum levels of consumer protection in several important issues relating to this topic).

Focusing specifically on the Portuguese reality, the transposition of the Directive will also require an important effort of systematization of the national legislation on consumer credits secured by immovable property, making it more accessible and comprehensible to the consumer itself.

Concerning specific aspects of the legal regime, as already mentioned above, the transposition of the Directive will implement the regulation of minimum standards for advisory services and the activity of credit intermediaries, as well as for the knowledge and skills required of the staff. It will also widen and strengthen the existing rules on the remuneration of the staff.

Moreover, it will force the Portuguese legislator to establish a legally binding minimum period of at least seven days as a reflection period before the conclusion of the agreement, or ideally, as a period for exercising a right of withdrawal after the conclusion of the credit agreement.

The densification of the rules on the creditworthiness assessment imposed by articles 18 and 20 of the Directive is also a relevant achievement over the preexisting Portuguese legal regime.

On the opposite side, the use of vague terms (such as “clear”, “accessible”, and “objective”) to identify the indexes or reference rates allowed to calculate the borrowing rate represents a subtle, but nevertheless very significant danger, potentially creating a fragility not yet present in the Portuguese reality.

The biggest limitation of Directive 2014/17 with regards to the Portuguese reality is, nevertheless, its inability to present an operational solution to the cases where, given the full recourse system on the enforcement of mortgages, the consumer in a situation of nonperformance not only loses his house, but remains in debt for the remainder.

As already stated in Part III of this paper, the programmatic nature of article 28/4 and 5 is not sufficient to ensure the solution of this central problem on consumer credit secured by mortgage. It is my opinion that the imposition of more restrictive *loan to value ratio* requirements would be of use to counterbalance the potential property devaluation, typical of economic crisis situations, and would not be a disproportionate solution on this topic.



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